IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOMAX PRODUCTS, INC., a Delaware corporation,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO. 4:08-cv-01560
	§	
HOMAX, INC., a Texas corporation	§	AFFIDAVIT OF GABRIEL GELB IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON INFRINGEMENT
Defendant.	§	

STATE OF TEXAS)
) ss.
County of Harris)

GABRIEL GELB, being first duly sworn on oath, deposes and states as follows:

I am a Senior Consultant for Gelb Consulting Group, Inc., am over the age of 18 and make this affidavit based upon personal knowledge and belief.

1. I have been involved in marketing and branding research since 1957 when I graduated with a Master's degree from the University of Missouri School of Journalism. I have extensive background in researching, reviewing and rendering opinions on issues relating to marketing and research, and the correlation of both in the context of trademarks. I have been an expert on many Lanham Act trademark and trade dress cases, including Two Pesos v. Taco Cabana, 505 U.S. 763 (1992). A true and correct copy of my CV is attached hereto and incorporated by reference as Exhibit A.

2. I have been asked to review several issues in this case by Plaintiff Homax Products Inc., including the commonality of customers of dollar stores and customers of Wal-Mart stores. I have been able to locate several research items which deal with this issue. First, in March, 2008, AC Nielsen, the world's largest market research company, reported that supercenter type stores such as Wal-Mart were enjoying a growth of household penetration to a level of 65%, while dollar stores had a growth to 64%. A true and correct copy of this report is attached hereto and incorporated by reference as Exhibit B.

3. In a December, 2005 report, Scarborough Research, a national media research company, analyzed what other stores that Wal-Mart specific customers were most likely to shop at. The survey conclusions showed that dollar stores were the most likely other stores that these customers would be frequenting. A true and correct copy of this report is attached hereto and incorporated by reference as Exhibit C. Finally, in August, 2003, one of the executives of AC Nielsen reported that a survey had indicated that "89% of dollar store shoppers 'also shop at Wal-Mart.'" A true and correct copy of this report is attached hereto and incorporated by reference as Exhibit D.

4. Given these empirical findings, and based upon my experience and knowledge of the competing markets, it is my opinion, on a more probable than not basis, that Wal-Mart customers are also customers of dollar stores. In this, customers shopping at Wal-Mart stores will also be shopping and purchasing goods at dollar stores.

Gabriel Gelb

Gabriel Gelb

SUBSCRIBED AND SWORN to before me this 21st day of May 2009.

Mary Jo Gibson

NOTARY PUBLIC in and for the state of Texas

MARY JO GIBSON
Notary Public, State of Texas
My Commission Expires
SEPTEMBER 28, 2010

Residing at HOUSTON, TX

My commission expires: 9-28-10

Exhibit A

Affidavit of Gabe Gelb in Support of Plaintiff's Motion for Summary Judgment on Infringement

VITA

Gabriel M. Gelb

Senior Consultant
Gelb Consulting Group, Inc.
1011 Highway 6 South, Suite 120
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281.759.3600 ext. 14

Residence
119 Sage Road
Houston, Texas 77056
713/623-2203

Education

M.A., University of Missouri School of Journalism, 1957
B.S., City University of New York, 1951

Offices Held

Current: President, Research Roundtable of Houston
Treasurer, Harris County Drug Court Foundation
Member, Mayor's Arts Marketing Committee

Past: Editorial Review Board, Journal of Marketing
Chair, Market Research and Analysis, United Way of Texas Gulf Coast
Vice President, Advertising Effectiveness Council, Business Marketing Association
Vice President, Friends of the Houston Public Library
Director, M.I.T. Enterprise Forum of Texas
National Director, American Marketing Association
President, Houston Chapter, A.M.A.
President, Houston Chapter, Institute of Management Consultants
Executive Committee and Chair, Marketing Committee, Houston Symphony Orchestra

Accredited

By the State Bar of Texas for 2 CLE hours for my course, "Uses and Misuses of Surveys in IP Litigation."

Member

The International Trademark Association

Books and Monographs

Gelb, Gabriel M., Nuts and Bolts of Business-to-Business Marketing Research. (Chicago, Business Marketing Association,1996)

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Refereed Journal Articles

Gelb, Betsy D., Stephanie A. Geiger-Oneto and Gabriel M. Gelb, "From Knowing to Doing: Experience and Flexibility Make the Difference," Journal of Business Strategy (September-October, 2008).

Gelb, Gabriel M. and Betsy D. Gelb, "Internet Surveys for Trademark Litigation," The Trademark Reporter, September-October 2007.

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Gelb, Gabriel M., and Betsy D., "Big Payoffs from Low-Budget Research," in William Locander, ed., 1976 Proceedings, American Marketing Association.

Expert Witness in Past 4 Years (underlined parties are clients)

Patricia Weiner and Stephen R. Berube, On Behalf of Themselves, All Others Similarly Situated and the General Public v. The Dannon Company, Inc. In the U. S. District Court, Central District of California, Western Division. No. CV-08-00415-SJO(AGRx)

The Modern Group LTD and Offshore Rental LTD v. Tiger Environmental and Rental Services L.L.C. and Karl Comeaux. In the U.S. District Court for the Western District of Louisiana, Lafayette Division. Case No. 6:07-CV-660

Dallas Cowboys Football Club Ltd. and NFL Properties LLC v. America's Team Properties Inc. In U. S. District Court for the Northern District of Texas, Dallas Division, Civil Action 06-ev-01906.

Stuart Spector Designs Ltd., et al. v. Fender Musical Instruments Corporation. In the U.S. Patent and Trademark Office Before the Trademark Trial and Appeal Board. Opposition 91161403.

Mills Well Service LLC v. ProPetro Services Inc. In the U.S. District Court, Western Division of Texas, Midland/Odessa Division. Civil Action MO-07-CV-047.

Putney Inc. v. Pfizer Inc. In the U. S. District Court, District of Maine. Civil Docket 2:07-cv-00108-DBH.

American Honda Motor Co., Inc. v. The Pep Boys – Manny, Moe and Jack et al – U.S. District Court for the Central District of California, Western Division, Los Angeles. Case No. CV05-8879 SJO (VBKx)

Legacy Academy Inc. v. LLC Concepts, L.P. etal – U.S. District Court for the Northern District of Texas, Dallas Division. Civil Action no. 3:06-CV-0745-P
Ecce Panis Inc. v. Maple Leaf Foods Inc. et al. – U.S. District Court, District of Arizona. No. CV07-1099PHX-SRB

HomeLife Communities Group v. HomeLife Realty Services, Inc. et al. – U.S. District Court for the Northern District of Georgia, Atlanta Division. Civil Action No. 1:06 - CV-1607

Powertrain Inc., Toolmart Inc., Wood Sales Co. Inc. v. American Honda Motor Co., Inc. – in the U.S. District Court for the Northern District of Mississippi, Eastern Division. Civil Action no. 1:30CV668MD

American Equity Mortgage Inc., v. Ray Vinson Jr.
Cause number 4:05CV1529 RWS – In the U.S. District Court, Eastern District of Missouri, Eastern District

Directed Electronics, Inc., v. Cobra Electronics Corporation
Opposition No.: 91162506 In The United States Patent and Trademark Office Trademark Trial and Appeal Board

Helen of Troy L.P. v. I & JC Corp. and Bayside Brush Co., d/b/a Camila Paris, Jorge E. Castillo and Ivan Lopez-Bosch, – Cause Number 2003-665 In The District Court Of El Paso County, Texas 34th Judicial District [Deposition and Trial Testimony]

Cordua Restaurants, L.P. v. Uptown Dining, Inc., d/b/a/ Americas Restaurant and Bar, Jorge Hector Hinojosa, and Alfredo N. Hinojosa – Civil Action No: 305CV0449-D In The United States District Court for The Northern District Of Texas, Dallas Division

MediFlex, Inc., v Nice-Pak Products, Inc. and Professional Disposables, Inc., – Case No.: 06-2015 KHV In The United States District Court for The District of Kansas [Deposition and Trial Testimony]

Endo Pharmaceuticals Inc., v. TAP Pharmaceutical Products Inc., –
Opposition No.: 91168481 In The United States Patent and Trademark Office Trademark Trial and Appeal Board

Celgene Corporation v. Centocor, Inc. – 03-CV-05978 In The United States District Court for The Eastern District of Pennsylvania [Deposition]

Van Well Nursery Inc. et al. v. Mony Life Insurance Company, et al. U.S. District Court, Eastern District of Washington. No. CV-04-0245-RHW.

Latin American Courier Inc. et al.. v. Airborne, Inc. et al. In the 285th Judicial District Court of Bexar County, Texas. Cause No. 204 CI 03951. [Deposition]

Universal Computer Consulting Ltd. et al. v. The Paul Gillrie Institute, Inc. et al. In the 113th Judicial District Court of Harris County, Texas. Cause No. 2004-50577.

Southwest Bank v. Southwest Securities Bank and SWS Group Inc. U. S. District Court, Northern District of Texas, Dallas Division. Civil Action No. 3:04-CV-1738-M.

Tiger Direct, Inc. v. Apple Computer Inc. – U.S. District Court, Southern District Court, Southern District of Florida. Case no. 05-21136 – Civ – Lenard Klein

The Estate of Mercer K. Ellington v. Gibson Piano Ventures, Inc., Baldwin Piano, Inc., Ellington Pianos et. Al – In the United States District Court for the Southern District of Indiana, Indianapolis Division. Case no. 1:03-cv-0804DFH-WTL

The Hasha Family Limited Partnership IV v. Varco, Inc. -- American Arbitration Association, Houston Office. Case 70Y 189 00371 03 [Deposition and Testimony]

Greater Houston Transportation Company, d/b/a Yellow Cab v. Yahya Hassan et al – In

the District Court of Harris County, Texas, 281st Judicial District [Trial Testimony]

Realty World America, Inc., d/b/a Realty World Broker Network v. Real Estate World Florida Commercial, Inc. et al – In the Superior Court for the State of California for the County of Orange. Case 03CC05190

Darryl Peterson v. Rockstar Games Inc., et al – In the U.S. District Court for the District of Utah, Central Division. Civil Action 2:03CR00163TC.

Healthpoint Ltd. Et al v. Ethex Corp. et al – In the U.S. District court for the Western District of Texas, San Antonio Division. Civil Action SA01CA06460G

Justin Brands, Inc. v. Lucchese, Inc. – In the U.S. District Court for the Northern District of Texas, Ft. Worth Division. Civil Action 4:04-ev-54-y

W.H. Energy Services and Dyna-Drill Technologies Inc. v Baker Chemicals, Inc. – In the U.S. District Court for the Southern District of Texas, Houston Division. Civil Action H-03-4295

John Middleton, Inc. and JMTM, Inc. v, Swisher International Group, Inc. – In the U.S. District Court for the Eastern District of Pennsylvania. Civil Action 03-3908 [Deposition]

Amica Mutual Insurance Company v. Amicus Mutual Insurance Company – In the U.S. District Court of Texas, Austin Division. Civil Action CA04-CA 27955

The Scooter Store Inc. v. Rosie Ray d/b/a Scooter Warehouse. In the United States District Court for the Western District of Texas, San Antonio Division. Case SA03CA04280G

Marketing on Hold, Inc., v. Muzak, L.L.C. et al – In the 269th District Court, Harris County, Texas. Cause No. 2002-32527 [Deposition]

Exhibit B

Affidavit of Gabe Gelb in Support of Plaintiff's Motion for Summary Judgment on Infringement

U.S. Consumers Making Fewer Shopping Trips

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Consumers Combine Errands to Compensate for High Gas Prices, Other Economic Pressures

Supercenters Show Growth While Shopping Frequency at Other Retail Outlets Flat or on Decline

17 March 2008
Schaumburg, IL

U.S. consumers are making fewer shopping trips across most retail outlets as they look for ways to combine errands and save money in an effort to battle rising gas prices and other economic pressures, according to The Nielsen Company.

Nielsen's consumer packaged goods (CPG) research shows that while shopping frequency across most retail channels is flat or on decline, supercenters[1], which enable consumers to combine shopping trips with more items in one store, continue to show growth.

	Annual Shopping Trips Per Household			Household Penetration (%)		
Retail Channel	2001	2006	2007	2001	2006	2007
All Outlets	181	170	164	100	100	100
Grocery	72	61	59	100	99	99
Mass Merchandise	24	16	15	93	84	82
Supercenter	20	26	27	53	62	65
Drug	15	14	14	86	82	81
Convenience/Gas	15	14	14	45	41	41
Dollar	11	13	12	59	65	64
Warehouse	10	11	11	50	52	51

Source: Nielsen Consumer Panel Services

"Value and convenience are more important than ever as rising gas prices impact where and how often consumers shop," said Todd Hale, senior vice president of Consumer & Shopper Insights, Nielsen Consumer Panel Services. "Long-term trends show us that all value retailers—supercenters, warehouse clubs[2] and dollar stores[3]—are gaining in their quest to grab shoppers. Keep in mind, however, that some U.S. grocers reported stronger same-store-sales growth than supercenters or dollar stores in 2007. Proximity to shoppers

and a healthy focus on convenience and value helped many of these grocers deliver solid results."

More Stores
Nielsen's research shows that retailers are responding to consumers' desire for value and convenience with increased store openings. Store count is on the rise in many retail channels, particularly in warehouse clubs, supercenters, dollar stores and convenience stores. Store closings and conversions of mass merchandise stores to supercenter formats has resulted in a decline in overall mass merchandise count, and while supermarket count is up, the growth is not at the rate of other retail channels.

U.S. Store Count

Retail Channel	2001	2007
Grocery	30,682	31,929
Mass Merchandiser	6,421	6,720
Drug	39,660	37,537
Supercenter	1,583	3,038
Dollar	13,151	19,624
Warehouse	907	1,152
Convenience/Gas	124,516	146,294

Source: Trade Dimensions® and TDLinx®, services of The Nielsen Company

"Increased store counts tell us that value and convenience are winning in the marketplace," said Hale. "Convenience retailers have expanded aggressively, but this channel is facing competitive pressure as 'big-box' retailers offer lower-priced gasoline, attracting consumers."

Hale notes that certain grocery segments, such as deep discount retailers and high-end or specialty grocers showed strong store count increases from 2001–2007.

"New and remodeled mainstream grocery formats also helped to pave the winning ways for some grocers," Hale said.

Variety in Alternative Shopping Channels
Alternative channels, including hardware/home improvement stores, office supply stores and automobile supply stores and bookstores are increasing the level of competition for traditional retailers—and increasing the distribution opportunities for manufacturers.

"CPG manufacturers have taken notice of alternative retail channels," said Hale. "For example, batteries and light bulbs have always had a strong presence in the hardware and home improvement channel, but the product assortment in this channel is expanding to include products from non-grocery and even food and beverage. This trend only increases competition for traditional CPG retailers."

Who Are Your Shoppers?
Nielsen reports that it is critical for retailers and manufacturers to understand which consumers are shopping in the different retail channels.

"Know your shoppers," said Hale. "Understanding the demographics of your loyal shoppers is absolutely essential for growth. With this knowledge, retailers and manufacturers can determine the products and brands that are the best fit for the consumers shopping in their stores."

Nielsen's research shows diversity in the types of consumers that are the biggest spenders in different retail channels. For example, younger and older bustling families[4] are important to mass merchandisers, supercenters, grocery and warehouse clubs while older couples and older singles show a preference for drug stores.

"Competition for shopper attention is fierce," said Hale. "Success will come to retailers who define themselves by who they sell to and how they sell them, not by what they sell, while success will come to manufacturers who define themselves by who they sell to and the issues they solve for their consumers and retail partners."

About The Nielsen Company

The Nielsen Company is a global information and media company with leading market positions in marketing information (ACNielsen), media information (Nielsen Media Research), online intelligence (NetRatings and BuzzMetrics), mobile measurement, trade shows and business publications (Billboard, The Hollywood Reporter, Adweek). The privately held company is active in more than 100 countries, with headquarters in Haarlem, the Netherlands, and New York, USA. For more information, please visit, www.nielsen.com.

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[1]Large food/drug combination store and mass merchandiser under a single roof.
[2]Giant store selling merchandise in larger packages at low prices and in which customers must buy a membership in order to shop.
[3]Smaller store selling inexpensive items, many at one dollar or less.
[4]Spectra, a service of The Nielsen Company, defines younger bustling families as large households with older children (6 and up), and the head of the household is less than 40 years old. Spectra defines older bustling families as large households with older children (6 and up) and the head of the household is more than 40 years old. Older bustling families are typically dual income families and have 3 or more vehicles.

Exhibit C

Affidavit of Gabe Gelb in Support of Plaintiff's Motion for Summary Judgment on Infringement

A Comparison of Wal-Mart and Target Shoppers

A Complimentary Study from Scarborough Research

December, 2005

www.scarborough.com

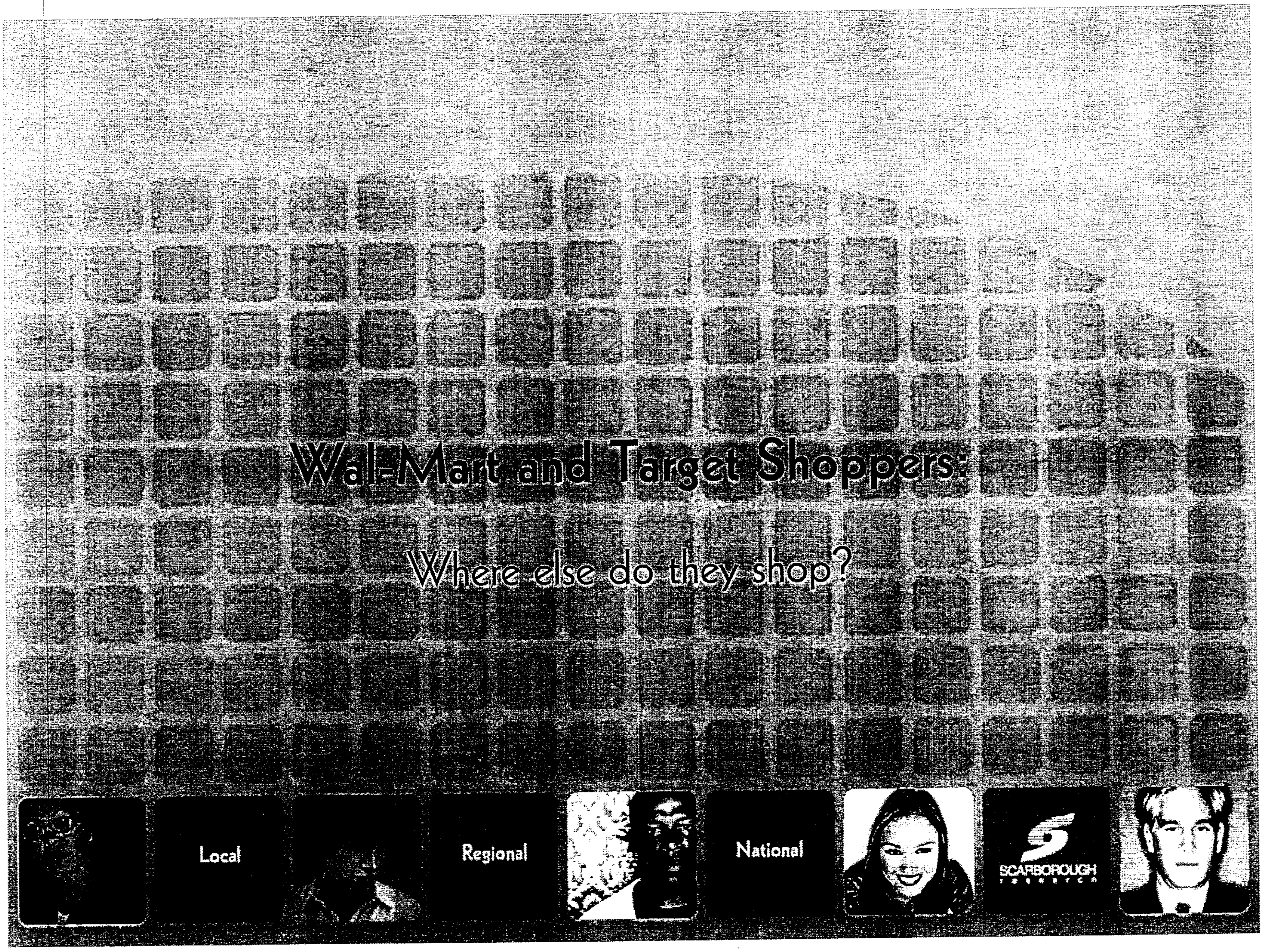
info@scarborough.com

Background: U.S. Retailers Analyzed in this Study

These are all major retailers at which at least 5% of the population in the 75 Scarborough markets shopped in the past 3 months.

- Best Buy
- Big Lots
- BJ's Wholesale Club
- Burlington Coat Factory
- Circuit City
- Costco
- Dillard's
- Dollar General
- Family Dollar
- JC Penney
- Kmart
- Kohl's
- Macy's
- Marshalls
- Meijer's
- Mervyn's
- Nordstrom
- Ross Dress for Less
- Sam's Club
- Sears
- Target
- The Home Depot
- TJ Maxx
- Value City Dept. Store
- Wal-Mart

Note: Respondents are asked to identify from a list of retailers, those at which they shopped in the past 3 months. The questionnaire lists major national and regional department stores, mass merchandisers, big boxes, and warehouse clubs, based on availability in the market in which the questionnaire is fielded.

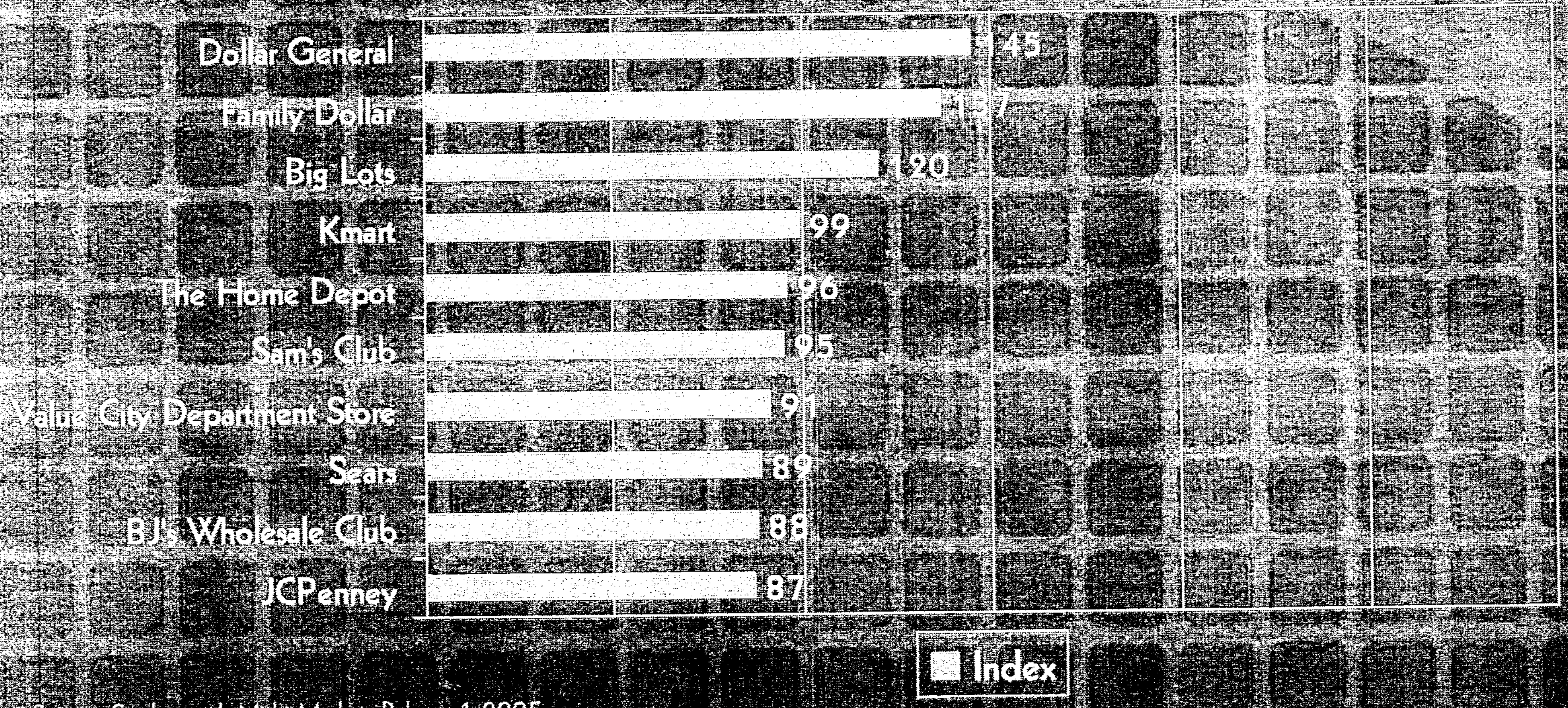

Wal-Mart and Target Shoppers:
Where else do they shop?
Local
Regional
National
SCARBOROUGH
research

Cross-Shopping

- Wal-Mart-exclusive shoppers are most likely to shop at Dollar General, Family Dollar, and Big Lots.
  - These are the only retailers in the analysis where Wal-Mart-exclusive shoppers are more likely to have shopped than the general population.
- Target-exclusive shoppers are most likely to shop at Nordstrom, Macy's, Costco, and Mervyn's.
  - In all they are more likely than the general population to have shopped at 12 of the other retailer brands in this analysis.

Where else do Wal-Mart Exclusive Shoppers shop?
A comparison to total adults

How to read: "Wal-Mart-exclusive shoppers are 45% more likely than the general population to have shopped at Dollar General."



Source: Scarborough Multi-Market, Release 1 2005

Exhibit D

Affidavit of Gabe Gelb in Support of Plaintiff's Motion for Summary Judgment on Infringement

Related Topics:
Market Research Firms | Marketing & Advertising Agencies | Discount & Club Stores | Grocery Stores & Supermarkets
Talks & Meetings | Currencies | Branding Las Vegas, NV, USA | Canada | New York, USA

RM's Second Dollar Summit Draws 16 Key Retailers

Publication: Retail Merchandiser
Date: Thursday, August 14 2003

LAS VEGAS -- *Retail Merchandiser*'s second Dollar and Value Retailing Summit was an overwhelming success. Held at Las Vegas' Venetian Hotel on August 7 to 8, it drew major executives from 16 key retail chains across the U.S. and Canada as well as more than 20 vendors of nationally branded products.

The Summit, held in association with ASD/AMD Trade Shows, centered on one-on-one, face-to-face private meetings between all participating retailers and suppliers. These 20-minute sessions allowed both parties to review new business opportunities or talk about the continuity of existing programs in a concise and concentrated format. For many participants, the venue provided access to retailers they had never met with before. "We've been trying for three years to get an appointment with one of the top retail executives who was in attendance," said a marketing executive for a multi-billion consumer products company. "This one meeting alone was more than worth the time and expense of attending the Summit."

Retailers were equally pleased. Merchandising executives at three of the largest dollar store chains in the nation--John Scanlon of Family Dollar, Tom Hartshorn of Dollar General, and Dick Saklad of 99 Cents

Only Stores--agreed to be part of a new advisory board being formed by *RM* to help formulate the program for future Summits. The next Dollar Store and Value Retailing Summit will be held in March 2004.

Other participating retailers included Big Lots, Liquidation World, Buck or Two Stores, Dollar Discount Stores of America, Jack's 99 Cent Store, Just a Buck, The $1 Store Plus, Variety Wholesalers, Victory Wholesale Grocer, Town Square Six and Yankee $1 Store. Many, including Big Lots, Liquidation World and Family Dollar, also participated in the first Dollar Summit, which was held in March in Chicago.

On the educational side, ACNielsen supplied dollar store data while SunTrust Robinson Humphry and WSL Strategic Retail focused on the growth and importance of the dollar store and closeout segments. An audience-participation discussion zeroed in on specific areas of interest, while cocktail receptions, breakfasts and lunches afforded additional networking venues.

Todd Hale, svp of Consumer Insights for ACNielsen, noted that 89% of dollar store shoppers "also shop at Wal-Mart." Patrick McKeever, vp/senior analyst of Atlanta-based SunTrust Robinson Humphry, said sales at dollar stores totaled $15 billion in 2002, representing a 15% increase over 2001. The mass market, in contrast, grew only 7%. "Dollar stores will continue to take sales away from other retail channels," he added.

Candace Corlett, consultant and partner at New York-based WSL Strategic Retail, pointed out that the poor economy is only partly behind dollar stores' increased growth. Research shows that higher income consumers are also becoming avid dollar store shoppers. Consumers, she added, have shifted their spending priorities. "Consumers are now saving to spend. In the 1990s, it was, 'I can have it all.' Now, if I want my $3 coffee at Starbucks, I have to save on buying toiletries."

At the roundtable discussions, participants were broken into eight groups. Each group was given a topic for discussion. Topics included dollar store technology, the changing role of apparel, inner city operations challenges and the growing role of food and consumables.

Dollar Summit attendees were also invited to attend the ASD/AMD Show, which began August 10 and was also held in Las Vegas.